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Education and Local Government

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EXHIBIT 25

From: MACOleg
Sent: Friday, July 03, 2015 9:35 AM
To: MACOleg
Subject: FW: Fireworks Bans and Restrictions on Activities

Commissioners, County Attorneys and Sheriffs,

With the Independence Day holiday and the extreme fire conditions, we are receiving inquiries about counties banning fireworks. Of course most of the calls came late yesterday! MACo recommends caution in doing so because specific authority is not granted in law and in fact has been specifically withheld three times by the legislature since 2001. Your county attorney is your legal advisor so you need to follow your county attorney's advice. The information below should be helpful. NOTE: we are providing this as information, not as a legal opinion.

It is my understanding that some counties are relying on 7-33-2212 as the authority to impose a ban. That section was enacted in 2007 as a part of a major rewrite of fire laws. It was intended to allow counties to follow the "Stage Restrictions" utilized by the USFS, BLM and DNRC to provide some control over specific activities such as timber harvest, agriculture, operation of off-road vehicles, smoking and campfires as well as outright closures when an emergency has been declared. Note that the commonly followed "Stage Restrictions" are silent about fireworks. The reason is that these agencies are responsible for the management of federal and state lands and as land managers, they may impose any restrictions they wish, just as you can on land that you may manage such as county owned land and parks.

Enactment of a fireworks ban on PRIVATE LAND is quite another matter.

7-33-2212. Activity restrictions in high fire hazard areas. (1) *A board of county commissioners may designate areas on private land or on land that is not under the jurisdiction of a municipality or a state or federal agency as high fire hazard areas.*

(2) *Except as provided in 87-3-106(2), in designated high fire hazard areas, the board may require all persons, firms, or corporations present or engaged in any activity in those areas to cease operations or activities or to adjust working hours to less critical periods of the day.*

(3) *The presiding officer of the board may control ingress and egress into a high fire hazard area if an emergency or disaster is declared under the provisions of Title 10, chapter 3, part 4.*

(4) (a) *An entity that is conducting official business, an entity having actual residence as a permanent or principal place of abode in the designated area, or an entity engaged in employment that does not present a fire hazard must be allowed ingress and egress unless there is a significant risk to human health or safety.*

(b) *For the purposes of this section, "official business" includes but is not limited to the functions of governmental agencies and the activities of utilities, cooperatives, and telecommunications providers to operate, construct, repair, and maintain utility facilities that are essential to the public.*

Other counties are relying on section 7-33-2205 MCA. A county may adopt a fire season pursuant to 7-33-2205 MCA. By establishing a fire season, a county can then implement a burning permit

system. Inherent to issuing burning permits is the ability NOT to issue permits when conditions warrant. However in doing so, a county cannot selectively pick and choose activities that are banned. Note the language carefully as it is very specific to "controlled burning".

7-33-2205. Establishment of fire season -- permit requirements -- reimbursement of costs. (1) (a) *Subject to the provisions of Title 76, chapter 13, part 1, the county governing body may in its discretion establish controlled burning seasons annually, during which, subject to 76-13-121, a person may not ignite or set a fire, including a slash-burning fire, land-clearing fire, debris-burning fire, or open fire within the county protection area on any residential or commercial property, forest, range, or croplands subject to the provisions of this part without having obtained an official written permit or permission to ignite or set a fire from the recognized protection agency for that protection area.*

(b) *If a person, entity, or representative of a person or entity has entered into a fire hazard reduction agreement pursuant to Title 76, chapter 13, part 4, and is complying with that agreement, open burning may be conducted, subject to 76-13-121, between October 1 and April 30 without obtaining a written permit or permission to set a fire. The person, entity, or representative of a person or entity shall:*

- (i) obtain air quality and ventilation forecasts before igniting or setting the fire; and*
- (ii) notify the county of the location of the burn area.*

(2) *A permit or permission is not needed for recreational fires measuring less than 48 inches in diameter that are surrounded by a nonflammable structure and for which a suitable source of extinguishing the fire is available.*

(3) *A person who purposely ignites a fire in violation of this section shall reimburse the county governing body or recognized protection agency for costs incurred for any fire suppression activities resulting from the illegal fire, as provided in 50-63-103.*

Any person who starts a fire is liable for the damages, as amended by SB 188 (2015):

Section 1. *Section 50-63-104, MCA, is amended to read:*

"50-63-104. Liability for forest or range fires. (1) *In a civil action against any person or entity that is not a state government entity or a political subdivision of state government, for a forest or range fire caused by a negligent or unintentional act or omission that is not willful or wanton, the actual and personal property damage is limited to:*

- (a) the reasonable costs for controlling or extinguishing the forest or range fire;*
- (b) economic damages; and*
- (c) either:*

- (i) the diminution of fair market value of the real and personal property resulting from the fire; or*
- (ii) the actual and tangible restoration costs associated with restoring the damaged real and personal property to its undamaged state to the extent that those actual and tangible restoration costs are reasonable and practical. The costs of restoring the unimproved property may not be greater than fair market value of the property immediately before the fire.*

- (2) As used in this section:*

(a) "economic damages" means objectively verifiable monetary loss, including but not limited to out-of-pocket expenses, loss of earnings, loss of use of property, and loss of business or employment opportunities;

(b) "fair market value" means the amount a willing buyer would pay a willing seller in an arm's length transaction when both parties are fully informed about all of the advantages and disadvantages of the property and neither is acting under any compulsion to buy or sell, as determined by a certified appraiser who is qualified to appraise the property;

(c) "forest or range fire" means a fire that burns any unimproved real property located outside of an incorporated municipality, regardless of whether there are improvements also affected by the fire, regardless of whether the fire also burns property within an incorporated municipality."

A general powers government has only the authority to do those things that are specifically authorized by the legislature in statute.

Municipalities have been granted the power to regulate fireworks within municipal limits by Section 7-33-4206 MCA. **There is no comparable authority for counties.**

7-33-4206. Regulation of bonfires, fireworks, and other fire-causing agents. *The city or town council has power to regulate or prohibit the building of bonfires or the explosion, use, or selling of fireworks, firecrackers, torpedoes, other pyrotechnics, or toy pistols or guns within the city or town.*

The legislature has considered bills in three sessions that I recall since 2001 to give counties that specific authority but all three bills have failed.

House Bill 708 was carried by Representative Jon Sonju in 2005 and was tabled in committee

Senate Bill 21 was carried by Senator Mack Cole's in 2001 and was tabled in committee

And most-recently in the 2015 Legislative Session, Senate Bill 44 was introduced by Senator Brendan. That bill died on the floor on a tied vote.

The fact that the legislature has refused to grant counties the specific authority to enact fireworks bans carries the strong implication that counties do not have the authority to ban fireworks. MACo has previously supported that premise so has never recommended to counties that they have the authority to ban fireworks.

Bottom line for counties is that your county attorney is your legal advisor and would be responsible for prosecution of any citations so you need to consult with your county attorney and follow the guidance and advice provided before enactment of a ban on the use of fireworks.

I hope everyone has a great holiday. I will be "off the grid" with no cell coverage until Monday so will not be able to respond to voice messages and e-mail until then.

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